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No. 82-1940

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

I. S. JOSEPH CO., INC., a Minnesota corporation; NORTHWESTERN NATIONAL BANK OF MINNEAPOLIS, a National Banking corporation; I. S. JOSEPH SHIPPING CO., LTD, a Bahamian corporation; and BURTON M. JOSEPH,

Petitioners,

v.

PARTREDERIET LISTA, a Norwegian partnership; PARTREDERIET POLYCREST, a Norwegian partnership; SCOUT SHIPPING CO., a Liberian corporation; J. LAURITZEN A/S, a Danish corporation; TAIHEIYO KAIUN CO. LTD., a Japanese corporation;

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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J. Lauritzen Holding A/S is the parent company of Respondents Scott Shipping Co. and J. Lauritzen A/S.

The following companies are affiliates of Scott Shipping Co. and J. Lauritzen A/S.

A/S Atlas
DFDS A/S
Aalborg Vaerft A/S
Esbjerg Tovvaerksfabrik A/s
JL Offshore Drilling A/s
Mols-linien A/S
Dan-Vaerft A/S
A/S Thomas Ths. Sabroe Co.
JL Offshore Drilling Inc.
Helsingor Vaerft A/S
Dania A/S
Odin Shipping Ltd.
Fredrikshavn Vaerft A/S
Ikas Isolering A/S

Taiheiyo Kaiun Co., Ltd. has no parent corporation, no affiliated corporations, nor any subsidiaries which are not wholly owned.

QUESTION PRESENTED

SHOULD THE UNITED STATES SUPREME COURT ISSUE A WRIT OF CERTIORARI TO REVIEW THE DISMISSAL OF AN APPEAL FROM AN INTERLOCUTORY ORDER OF A STATE COURT EXERCISING ITS DISCRETION TO STAY PROCEEDINGS PENDING THE OUTCOME OF ARBITRATIONS IN PROGRESS ELSEWHERE, BUT ALLOWING DISCOVERY TO PROCEED ON NON-ARBITRABLE ISSUES?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iv
Statement of the Case	1
Reasons for Denying the Writ:	
1. Introduction and Summary of Argument	4
2. The Petition Presents No Federal Questions	5
3. Petitioners Are Without Standing to Seek Review of an Unrelated Case	7
Conclusion	8

APPENDIX INDEX

Exhibit 1—Complaint A-1
Exhibit 2—Letter dated May 9, 1983, from the Office of the Clerk, Supreme Court of the United States .. A-15
Exhibit 3—Supplemental Joint Memorandum of Defendants A-16

TABLE OF AUTHORITIES

Cases:

Abrams v. Van Schaick, 293 U.S. 188 (1934) 6
Collection Consultants, Inc. v. Texas, 436 U.S. 901 (1978) 7
Conrad v. Commerce Bank, 436 U.S. 901 (1978) ... 7
Conway v. Wisconsin, 436 U.S. 915 (1978) 7
Johnson v. Risk, 137 U.S. 300 (1890) 6
Lynch v. People ex rel Pierson, 293 U.S. 52 (1934) .. 6
Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 103 S. Ct. 927 (1983) 7
Nederlandse Erts-Tankersmaatschappij v. Isbrandtsen Co., 339 F. 2d 440 (2d Cir. 1964)..... 6

Rice v. Sioux City Memorial Park Cemetery, Inc. 349 U.S. 70 (1955) 6
Thayer v. American Financial Services, 322 N.W. 2d 599 (Minn. 1982) 4, 5, 8

Statutes:

9 U.S.C. §3 .....4, 5
Rule 103, Minnesota Rules of Civil Appellate Procedure 3

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Petitioners,

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

STATEMENT OF THE CASE

Respondents, Plaintiffs below, are owners of maritime vessels. They commenced this action by filing a Complaint in District Court, Fourth Division, Hennepin County, Minnesota. Count I of the Complaint (Appendix, Exhibit 1) alleges that Petitioner I. S. Joseph Shipping Co., Ltd. (hereinafter "Shipping") has breached charter agreements between Shipping and Respondents for the use of Respon-

dents' vessels. Count I of the Complaint unequivocally acknowledges that these claims are arbitrable under arbitration clauses in the respective charter agreements. These claims are in fact being arbitrated in five separate arbitration proceedings now under way in New York and London. The Complaint does not ask the Hennepin County District Court to adjudicate these arbitrable issues or to obstruct the enforcement of the arbitration agreements, and neither of the two lower courts have ever asserted jurisdiction to do so.

The remaining Counts of Respondents' Complaint present claims separate and distinct from the issue in arbitration. They allege that Petitioner I.S. Joseph Co., Inc. ("Joseph Co."), Shipping's parent company, fraudulently caused assets to be transferred from Shipping to itself, including the payment of a $1,500,000 cash dividend and the shifting from Shipping to Joseph Co. of highly profitable contracts for the transport of citrus pellets from Brazil to Europe, all with the intent of depriving Shipping of assets with which to pay amounts due Respondents under the charters. (Appendix, Exhibit 1, Count VI). Respondents also allege that Petitioner Northwestern National Bank of Minneapolis ("Bank") participated in and benefited from these shifts of assets. (Appendix, Exhibit 1, Count VI). The Complaint seeks reversal of the transfer of assets, and judgments declaring Joseph and Bank liable to Respondents for the amounts determined in the arbitrations to be due from Shipping.

Petitioners other than Shipping have never contended that they have any agreements to arbitrate claims against them, and there are no such agreements. Since the claims against Shipping concerning its breaches of charter agree-

ments have been submitted in their entirety to arbitration, the remaining claims—having to do with the stripping of Shipping's assets and the liability of Joseph Co. and Bank for Shipping's obligations—are the only real issues before the Hennepin County District Court.

Petitioners moved the District Court of Hennepin County, State of Minnesota, the Honorable Robert E. Bowen, for a stay of all proceedings, including proceedings on the non-arbitrable issues. On May 12, 1982, Judge Bowen issued an Order and Memorandum staying proceedings in this case until completion of the New York and London arbitrations (Petitioners' Appendix, Exhibit C).

Judge Bowen's Order, however, allowed discovery to continue.[1] All of the subsequent proceedings, in the Supreme Court of Minnesota and in this Court, arise from Petitioners' attempts to prevent discovery—involving such non-arbitrable matters as what happened to Shipping's asserts—from going forward.

First, Petitioners appealed from the portion of Judge Bowen's Order which allowed the parties to commence discovery, and obtained a stay of proceedings pending appeal. Respondents moved to dismiss the appeal, basing their motion solely on Minnesota law—that the Order appealed from was a non-appealable interlocutory order under Rule 103.03 of the Minnesota Rules of Civil Appellate Procedure. On October 4, 1982, the Supreme Court of Minnesota, by order of the Chief Justice of that court, dismissed the appeal,

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[1]Respondents have never attempted to obtain, or asserted a right to obtain, any discovery from Shipping in Hennepin County District Court pertaining to issues which are in arbitration. On May 16, 1983, at Respondents' suggestion, Judge Bowen clarified his order of May 12, 1982 by expressly exempting Shipping from responding to any discovery requests which exclusively concern the issues in arbitration in New York and London. (Petitioner's Appendix, Exhibit D.)

characterizing the order appealed from as an interlocutory order, and making no reference of any kind to federal law. (Petitioners' Appendix, Exhibit A).

Next, Petitioners filed a Petition for Rehearing. The Supreme Court of Minnesota denied that Petition by Order dated March 1, 1983 (Petitioners' Appendix, Exhibit B). No federal grounds were cited by the court in denying the Petition for Rehearing, nor was any reference made to federal law.

Petitioners then applied to the Minnesota Supreme Court for a stay of proceedings pending their Petition to this Court for a Writ of Certiorari. On April 25, 1983 that Application was denied. Petitioners subsequently applied to this Court for a stay. The Honorable Harry A. Blackmun, Associate Justice of this Court, acting as Circuit Justice, denied the application. (Appendix, Exhibit 2). Finally, this Petition was filed.

REASONS FOR DENYING THE WRIT

I.

Introduction and Summary of Argument.

This case presents no federal question. It involves a state trial court judge's exercise of his discretion—acknowledged by all parties—to order discovery on issues not in arbitration. The United States Arbitration Act, 9 U.S.C. §1 *et seq.* does not require that discovery on non-arbitrable issues be stayed.

The decision of the Minnesota Supreme Court in the totally unrelated case of *Thayer v. American Financial Services,* 332 N.W. 2d 599 (Minn. 1982) played no part in the decisions of the courts below, and this case is an inappro-

priate vehicle for review of the decision in *Thayer*, assuming such review may be desirable.

II.

This Petition Presents No Federal Question.

Petitioners' assertion in this Court that the United States Arbitration Act, 9 U.S.C. §1, *et seq.*, prevents discovery on non-arbitrable issues—a contention for which they cite no authority — is in sharp contrast to their position in the Hennepin County District Court, where they acknowledged in writing that the trial court's decision to grant or deny a stay was within its discretionary power. (Supplemental Joint Memorandum of Defendants submitted in the Court below, Appendix, Exhibit 3, pp. A-24-25). The discretionary basis for such a stay was again acknowledged by Petitioners in open court at the hearing on their motion, as Judge Bowen specifically noted in the Memorandum which accompanied his Order. (Petitioners' Appendix, Exhibit C).

In all subsequent proceedings, first in the Minnesota Supreme Court and now in this Court, Petitioners have never claimed that the Hennepin County District Court abused the discretion they acknowledged it had.[2] They have never explained the federal interest in stopping discovery on such non-arbitrable issues as whether Shipping was improperly stripped of its assets. Further, Petitioners have never explained, in the Supreme Court of Minnesota or in

[2]Ample evidence was presented to the Hennepin County District Court to support the exercise of its discretion to allow discovery on the non-arbitrable claims. Judge Bowen's Memorandum acknowledged Respondents' "fear that by delay they will lose evidence and jeopardize the eventual payment of any award in the arbitration proceeding or in this action." Respondents' fear has already proved to be well-founded (See footnote 3 *infra*).

this Court, the federal interest requiring review of Rule 103.03, Minnesota Rules of Civil Appellate Procedure, prohibiting interlocutory appeals.

Petitioners assert the presence of a federal question, but the record reveals only discretionary determinations made by a state trial court judge on an issue involving discovery on non-arbitrable claims. Only the record itself, not conjecture or inference, should determine whether the record presents a federal question. *Lynch v. People ex rel Pierson,* 293 U.S. 52, 54, (1934); *Abrams v. Van Schaick,* 293 U.S. 188, 189, (1934). *Johnson v. Risk,* 137 U.S. 300, 307, (1890).

Petitioners now insist that the United States Arbitration Act governs this entire matter, notwithstanding the fact that all parties have previously acknowledged that §3 of that Act, regarding stays, does not require stays on non-arbitrable claims. Petitioners themselves cited *Nederlandse Erts-Tankersmaatschappij v. Isbrandtsen Co.,* 339 F.2d 440 (2d Cir. 1964) in support of the proposition that the grant or denial of a stay on non-arbitrable issues was within the discretionary power of the Hennepin County District Court. (Appendix, Exhibit 3, pp. A-24-25).

Rule 17, Revised Rules of the Supreme Court of the United States, provides that writs of certiorari are not granted as a matter of right, but only where the Court is convinced that there are "special and important reasons" for doing so. "Special and important reasons" involve decisions necessary to serve public concerns, not to aid one litigant.[3] Discovery of the facts on such matters as what happened to Shipping's assets presents no special or important issue for this Court. *See Rice v. Sioux City Memo-*

rial Park Cemetary, Inc., 349 U.S. 70, 73-74, (1955). Thus, denial of the Petitioner's Application for a Writ of Certiorari is appropriate, just as it was appropriate in the following cases, for lack of a substantial federal question: *Conrad v. Commerce Bank*, 436 U.S. 901 (1978); *Collection Consultants, Inc. v. Texas*, 436 U.S. 901 (1978); and *Conway v. Wisconsin*, 436 U.S. 915 (1978).

Finally, the decision of this Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 103 S. Ct. 927 (1983), has nothing to do with this case. There, the Court affirmed the Court of Appeals' reversal of a United States District Court's decision to abstain, because of a parallel state action, from exercising its jurisdiction in an action to compel arbitration. The circumstances of that case indicated that abstention might frustrate the federal policy favoring enforcements of agreements to arbitrate. But here, the agreements to arbitrate were acknowledged in the Complaint and are being carried out without any obstruction whatsoever.

III.

Petitioners Are Without Standing to Seek Review of an Unrelated Case.

The Petition for Writ of Certiorari does not seek review of any decision in *this* case, which involves no federal ques-

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[3]Petitioners' appeal in the courts below, and the stay of proceedings which accompanied them, may have aided Petitioners, but they have ill-served the interests of justice. As set forth more fully in Respondents' Reply to Petitioners' Application for Stay (pages 7-9), previously filed with this Court, the appeals below have delayed discovery in this case for one year, during which time an important witness died. A grant of the Petition for a Writ of Certiorari would serve no federal interest, and would only provide Petitioners with opportunities to seek further delays.

tion, but rather seeks review of a totally unrelated Minnesota Supreme Court decision, *Thayer v. American Financial Services*, 322 N.W.2d 599 (Minn. 1982), the holding of which was never relied upon by Respondents or by the lower courts. *Thayer* involved the question of whether the body of federal law developed by the federal courts must be applied by state courts to all agreements to arbitrate involving interstate commerce. 322 N.W.2d at 603. Regardless of the correctness of the *Thayer* holding, it is not involved here, since neither the Hennepin County District Court nor the Minnesota Supreme Court has interpreted any agreement to arbitrate or obstructed the enforcement of any such agreement. The Hennepin County District Court's exercise of its discretion in requiring disclosure of the facts on non-arbitrable issues has in no way interfered with the right of Shipping to have its liabilities under the Charter agreements arbitrated, which is in fact being done.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Exhibit I

STATE OF MINNESOTA
County of Hennepin

DISTRICT COURT
Fourth Judicial District

PARTREDERIET LISTA, a Norwegian partnership,

PARTREDERIET POLYCREST, a Norwegian partnership,

SCOUT SHIPPING CO., INC., a Liberian corporation,

J. LAURITZEN A/S, a Danish corporation,

TAIHEIYO KAIUN CO. LTD., a Japanese corporation,

Plaintiffs,

v.

I. S. JOSEPH CO., INC., a Minnesota corporation;

NORTHWESTERN NATIONAL BANK OF MINNEAPOLIS, a National Banking corporation;

I. S. JOSEPH SHIPPING CO., LTD., a Bahamian corporation;

BURTON M. JOSEPH,

Defendants.

Complaint

Plaintiffs, for their cause of action, state and allege as follows:

Parties to this Action

1. Plaintiff Partrederiet Lista is a Norwegian partnership. At the present time, and at other pertinent times, it was the owner of the vessel "Moshill".

2. Plaintiff Partrederiet Polycrest is a Norwegian partnership. At the present time, and at other pertinent times, it was the owner of the vessel "Polycrest".

3. Plaintiff Scout Shipping Co., Inc. is a Liberian corporation. At the present time, and at other pertinent times, it was the owner of the vessel "Jonna Dan".

4. Plaintiff J. Lauritzen A/S is a Danish corporation. At the present time, and at other pertinent times, it was the owner of the vessel "Irena Dan".

5. Plaintiff Taiheiyo Kaiun Co. Ltd., is a Japanese Limited Corporation. At the present time, and at other pertinent times, it was the owner of the vessel "Princess I".

6. Defendant I.S. Joseph Shipping Co. Ltd., (hereinafter referred to as "Shipping") is a corporation organized in the Bahamas, having its principal place of business at the Grain Exchange Building, Minneapolis, Minnesota. With the exception of qualifying shares held by directors, it is wholly owned by Defendant I.S. Joseph Co., Inc.

7. Defendant I.S. Joseph Co., Inc. (hereinafter referred to as "Joseph Co.") is a Minnesota corporation, having its principal place of business at the Grain Exchange Building, Minneapolis, Minnesota.

8. Defendant Northwestern National Bank of Minneapolis (hereinafter referred to as "Bank") is a corporation chartered under the National Banking Act. By reason of

certain loan agreements between Bank and Joseph Co., Bank claims to have security interests in property held by Joseph Co., including certain property of Shipping wrongfully conveyed to Joseph Co., as alleged herein.

9. Defendant Burton M. Joseph is the chairman of the board of directors, chief executive officer and principal stockholder of Defendant Joseph Co.

Count I

Against Shipping for Damages Caused by Breach of the Charter Agreements

10. Under a charter agreement dated August 17, 1979, Plaintiff Partrederiet Lista chartered the Moshill to Shipping and Shipping was obligated to pay hire for the use of said vessel. In September, 1981, Shipping defaulted on its obligation to pay hire then due and owing under the charter and the vessel, under the terms of the charter, was withdrawn from the service of Shipping. As a result, Partrederiet Lista has sustained damages which exceed $2,200,000.00, the exact amount being subject to determination under the arbitration provisions of the charter agreement.

11. Under a charter agreement dated June 6, 1980, Plaintiff Partrederiet Polycrest chartered the Polycrest to Shipping and Shipping was obligated to pay hire for the use of said vessel. In September 1981, Shipping defaulted on its obligation to pay hire then due and owing under the charter and the vessel, under the terms of the charter, was withdrawn from the service of Shipping. As a result, Partrederiet Polycrest has sustained damages which exceed $1,500,000.00, the exact amount being subject to determi-

nation under the arbitration provisions of the charter agreement.

12. Under the charter agreement dated August 20, 1980, Plaintiff Scout Shipping Co., Inc. chartered the Jonna Dan to Shipping and Shipping was obligated to pay hire for the use of said vessel. In September 1981, Shipping defaulted on its obligation to pay hire then due and owing under the charter and the vessel, under the terms of the charter, was withdrawn from the service of Shipping. As a result, Scout Shipping Co., Inc. has sustained damages which exceed $3,500,000.00, the exact amount being subject to determination under the arbitration provisions of the charter agreement.

13. Under a charter agreement dated February 10, 1978, Plaintiff J. Lauritzen A/S chartered the Irena Dan to Shipping and Shipping was obligated to pay hire for the use of said vessel. In September 1981, Shipping defaulted on its obligation to pay hire then due and owing under the charter and the vessel, under the terms of the charter, was withdrawn from the service of Shipping. As a result, J. Lauritzen A/S has sustained damages which exceed $1,300,000.00, the exact amount being subject to determination under the arbitration provisions of the charter agreement.

14. Under a charter agreement dated August 15, 1980, Plaintiff Taiheiyo Kaiun Co. Ltd. chartered the Princess I to Shipping and Shipping was obligated to pay hire for the use of said vessel. In September 1981, Shipping defaulted on its obligation to pay hire then due and owing under the charter and the vessel, under the terms of the charter, was withdrawn from the service of Shipping. As a result,

Taiheiyo Kaiun Co. Ltd. has sustained damages which exceed $2,000,000.00, the exact amount being subject to determination under the arbitration provisions of the charter agreement.

15. Shipping has failed and refused to pay the hire due Plaintiffs and is, therefore, in breach of the charter agreements. By reason of its breach, Shipping is, and should be declared, liable to Plaintiffs as follows:

(a) to Partrederiet Lista in an amount in excess of $2,200,000., with interest, the exact amount subject to determination under the arbitration provisions of the charter dated August 17, 1979;

(b) to Partrederiet Polycrest in an amount in excess of $1,500,000., with interest, the exact amount subject to determination under the arbitration provisions of the charter dated June 6, 1980;

(c) to Scout Shipping Co., Inc. in an amount in excess of $3,500,000., with interest, the exact amount subject to determination under the arbitration provisions of the charter dated August 20, 1980;

(d) to J. Lauritzen A/S in an amount in excess of $1,300.00., with interest, the exact amount subject to determination under the arbitration provisions of the charter dated February 10, 1978;

(e) to Taiheiyo Kaiun Co., Ltd. in an amount in excess of $2,000,000., with interest, the exact amount subject to determination under the arbitration provisions of the charter dated August 15, 1980.

Count II

Against Joseph Co. for Declaratory Judgment That Joseph Co. Is Liable for Obligations of Its Subsidiary

16. Plaintiffs reallege by reference paragraphs 1 through 15.

17. During the period in which Shipping was obligated to pay Plaintiffs under the charter agreements, Joseph Co. (a) controlled Shipping and employed its business and assets for the sole benefit of Joseph Co., (b) siphoned off Shipping's funds and other property to itself, (c) commingled Shipping's funds and other property with its own, (d) used Shipping as its instrumentality and alter ego, (e) used the purported separate identity of Shipping as a facade to avoid payments of amounts owed to Plaintiffs, and (f) caused Shipping to be insolvent and to be without sufficient capitalization to conduct the business in which it was engaged, specifically its maritime charter business with Plaintiffs.

18. The conduct of Joseph Co. described in Paragraph 17 included, among other things, the following specific wrongful acts:

(a) In June, 1981, Joseph Co. willfully, wrongfully, without consideration, and with the intent of defrauding Plaintiffs, caused Shipping to declare a purported dividend in the amount of $1.5 million, and convey to Joseph cash or property in that amount. Joseph Co. thus diverted assets from Shipping to itself which otherwise would have, and properly should have, been paid to Plaintiffs under the charter agreements.

(b) During 1981, Joseph Co. willfully, wrongfully, without consideration, and with the intent of defrauding Plaintiffs, appropriated from Shipping rights to receive income under contracts Shipping had with certain Brazilian shippers of citrus pellets. Joseph Co. has received substantial funds and property under said contracts, thus diverting to itself funds and property of Shipping which otherwise would have, and properly should have, been paid to Plaintiffs under the charter agreements.

(c) During 1981, Joseph Co. willfully, wrongfully, without consideration, and with the intent of defrauding Plaintiffs, caused assets of Shipping in amounts exceeding $3,000,000 to be pledged as security in support of loans to Joseph Co. and other companies related to it, thereby wrongfully depriving Shipping of assets which otherwise would have, and properly should have, been paid to Plaintiffs under the charter agreements.

19. By the actions described in Paragraphs 17 and 18 Joseph Co. willfully and wrongfully stripped Shipping of assets it needed to carry out obligations to pay Plaintiffs the amounts due them under the charter agreements.

20. By reason of these facts and notwithstanding the purported separate identity of Shipping, the acts of Shipping were the acts of Joseph Co., and Joseph Co. is, and should be declared, liable to Plaintiffs for damages due them as a result of the breach of said charters described in paragraphs 10 through 15.

Count III

Against Joseph Co. and Bank for Declaratory Judgment for Obligations Incurred by Their Agent, Shipping

21. Plaintiffs reallege by reference paragraphs 1 through 20.

22. At all pertinent times Joseph Co. dominated, directed, controlled, and supervised the activities of Shipping, including the making and breach of the charter agreements with Plaintiffs.

23. At all pertinent times Joseph Co. was indebted to Bank in large amounts. Under the loan agreements in effect between Bank and Joseph Co., Bank dominated, directed, controlled, and supervised the conduct and affairs of both Joseph Co. and Shipping. The actions of Joseph Co. and Shipping alleged herein were carried out under the knowledge, direction, control and domination of Bank, and for the benefit of Bank, whose loans to Joseph Co. were either repaid or made more secure as a result of said actions.

24. By reason of Joseph Co.'s and Bank's control of the affairs of Shipping, an agency relationship was created whereby Shipping acted as the agent of Joseph Co. and Bank. Accordingly, Joseph Co. and Bank are, and should be declared, jointly and severally liable to the Plaintiffs for damages due them as a result of the breach of the charters as described in paragraphs 10 through 15.

Count IV

Against Joseph Co., Burton M. Joseph, and Bank for Judgment for Interference with Contract

25. Plaintiffs reallege by reference paragraphs 1 through 24.

26. Bank, Joseph Co., and Burton M. Joseph, in his capacity as chief executive officer and chairman of the board of directors of Joseph Co., directed and controlled the affairs of Shipping. With full knowledge of Shipping's charter obligations to Plaintiffs, and without justification, these Defendants intentionally interfered with and prevented the performance of said charter agreements by Shipping and induced the breach thereof by Shipping. Accordingly, these Defendants are, and should be declared, liable to Plaintiffs for the damages due them as a result of the breach of the charter agreements described in paragraphs 10 through 15.

Count V

Against Joseph Co. and Burton M. Joseph for Damages for Fraud

27. Plaintiffs reallege by reference paragraphs 1 through 26.

28. During 1981 Joseph Co. and Burton M. Joseph falsely represented to Plaintiffs that Joseph Co., and not Shipping, had the rights to receive income under the contracts with shippers of Brazilian citrus pellets referred to in paragraph 18, and fraudulently concealed from Plaintiffs that Joseph Co. had in fact appropriated these contracts from Shipping without consideration, and for purposes of defrauding Plaintiffs. Joseph Co. and Burton Joseph knew that such representations were false at the time they were made. These representations and concealment had the purpose of deceiving Plaintiffs and of inducing their reliance.

29. Plaintiffs believed these representations and, in reliance thereon, were induced to, and did in fact, forego

legal rights which they had against Shipping upon its breach of the charter agreements.

30. By reason of the misrepresentations of Joseph Co. and Burton M. Joseph, Plaintiffs have been damaged in respective amounts not presently determined for which Joseph Co. and Burton M. Joseph are jointly and severally liable, and Plaintiffs are entitled to judgments in respective amounts determined by the Court to be the damages sustained by them.

Count VI

Against Shipping, Joseph Co. and Bank for Remedies Under the Uniform Fraudulent Conveyance Act

31. Plaintiffs reallege by reference paragraphs 1 through 30.

32. The conveyances referred to in paragraph 18 were made at a time when Shipping was insolvent, as that term is defined by Minnesota Statutes §513.21; alternatively, said conveyances rendered Shipping insolvent, as that term is so defined.

33. The conveyances referred to in paragraph 18 were made without fair consideration as that term is defined in Minnesota Statutes §513.22.

34. The conveyances referred to in paragraph 18 were made at times when Shipping was engaged in business with Plaintiffs pursuant to the charter agreements. After each respective conveyance, Shipping had remaining it its hands an unreasonably small amount of capital for such business.

35. The conveyances referred to in paragraph 18 were made when it was known and intended that Shipping, after

said conveyances were made, would incur debts under the charter agreements beyond its ability to pay as they matured.

36. The conveyances referred to in paragraph 18 were made with intent to hinder, delay or defraud creditors, specifically the Plaintiffs.

37. Bank benefitted by the conveyances described in paragraph 18 (a) and 18 (b) in that the conveyances made certain loans from Bank to Joseph Co. more secure, or enabled Joseph Co. to repay those loans.

38. As a result of the fraudulent conveyances between and among the Defendants, Plaintiffs are entitled under Minnesota Statutes §513.28 to judgment as follows:

(a) setting aside the conveyances referred to in paragraph 18.

(b) ordering Joseph Co. to return to Shipping all property and assets which it received in such conveyances and all income it earned as a result of such conveyances, and ordering Defendant Bank to return to Shipping all such property and assets which are now in the hands of Bank regardless of the form such property and assets are now held by Bank,

(c) declaring null and void any purported security interest of Bank in any property or assets held by Joseph Co. as a result of such conveyances,

(d) declaring null and void any purported security interest of other parties in assets of Shipping pledged as collateral on loans to Joseph Co. or other companies, and

(c) ordering Shipping to preserve such property and assets so that they may be made available for execution by Plaintiffs.

Count VII

Against Shipping, Joseph Co. and Bank
for an Accounting

39. Plaintiffs reallege by reference paragraphs 1 through 38.

40. The commingling of the assets of Shipping and Joseph Co., including the conveyances described in paragraph 18, was fraudulent as to the rights of Plaintiffs as creditors of Shipping.

41. In addition, the misrepresentations alleged in paragraph 28 created a false picture of the financial condition of Shipping.

42. The fraudulent conveyances and misrepresentations alleged herein have created the need for, and Plaintiffs are entitled to, an accounting of the assets of Shipping and Joseph Co., and of the assets of Shipping and Joseph Co. obtained by Bank, so that the Court can properly determine the amounts due to Plaintiffs.

Count VIII

Against All Defendants
Punitive Damages

43. Plaintiffs reallege by reference paragraphs 1 through 42.

44. At all pertinent times the acts of Defendants described herein, including the commingling and fraudulent conveyance of assets, wrongful interference with contractual obligations, and misrepresentations and concealment of facts, demonstrated a willful indifference to the rights of Plaintiffs. Accordingly, Plaintiffs are entitled to an award of punitive damages pursuant to Minnesota Statute §549.20.

WHEREFORE, Plaintiffs request the following relief:

1. That, pursuant to Counts I, II and III, judgment be entered declaring Shipping, Joseph Co. and Bank liable to Plaintiffs for breach of the charter agreements;

2. That, pursuant to Count IV, judgment be entered declaring Joseph Co., Burton M. Joseph and Bank liable to Plaintiffs for interference with contract in inducing the breach of the charter agreements;

3. That, pursuant to Counts I, II III and IV, judgment be entered in favor of Plaintiffs and against Defendants in the following amounts, subject to exact determination by arbitration under the charter agreements:

(a) to Partrederiet Lista in excess of $2,200,000, with interest,

(b) to Partrederiet Polycrest in excess of $1,500,000, with interest,

(c) to Scout Shipping Co., Inc. in excess of $3,500,000, with interest,

(d) to J. Lauritzen A/S in excess of $1,300,000, with interest,

(e) to Taiheiyo Kaium Co., Ltd. in excess of $2,000,000, with interest;

4. That, pursuant to Count V, judgment be entered in favor of Plaintiffs and against Joseph Co. and Burton M. Joseph in an amount in excess of $50,000;

5. That, pursuant to Count VI:

(a) the fraudulent conveyance described herein be set aside,

(b) Joseph Co. and Bank be ordered to return to Shipping all such property and assets conveyed, along with all income earned on such property and assets,

(c) all purported security interests in such property and assets be declared null and void, and

(d) the judgment herein be declared a lien on such property and assets, and Shipping be ordered to preserve them so as to be available for execution by Plaintiffs;

6. That, pursuant to Count VII, Shipping and Joseph Co. be required to account to Plaintiffs for all property and assets held by them, and Bank be required to account to Plaintiffs for all property and assets obtained by Bank as a result of the fraudulent conveyances described herein;

7. That, pursuant to Count VIII, judgment be entered against Defendants, and each of them, in the amount of $20,000.00 as punitive damages;

8. That Plaintiffs be awarded their costs and disbursements of this action, including attorneys fees, and such further relief as the Court deems just and equitable.

BASSFORD, HECKT, LOCKHART
& MULLIN, P.A.
/s/ William E.Mullin
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Exhibit 2
Office of the Clerk
Supreme Court of the United States
Washington, D. C. 20543
May 9, 1983

Hyman Edelman, Esq.
William Z. Pentelovitch, Esq.
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Minneapolis, Minnesota 55402

Lawrence C. Brown, Esq.
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Minneapolis, Minnesota 55402

RE: I. S. Joseph Co., Inc., etc., et al. v. Partrederiet Lista, etc., et al.
A-886

Dear Counsel:

Your application for a stay in the above-entitled case has been presented to Justice Blackmun, who has endorsed thereon the following:

"Application is Denied
Harry A. Blackmun
Associate Justice
9 May 1983"

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By

Christopher W. Vasil
Deputy Clerk

rjb

cc: Maclay R. Hyde, Esq.
William E. Mullin, Esq.

Exhibit 3

File No.: 789161

Supplemental Joint Memorandum of Defendants I. S. Joseph Co., Inc., I. S. Joseph Shipping Co., Ltd. and Burton M. Joseph in Support of Their Separate Motions

I. Introduction

I. S. Joseph Shipping Co., Ltd. ("Shipping"), I. S. Joseph Co., Inc. ("Joseph Co.") and Burton M. Joseph ("Joseph") have moved to stay this action pending resolution of arbitration proceedings between Shipping and the Plaintiffs. In addition, Shipping, Joseph Co. and Joseph (collectively referred to as "Moving Defendants") have also asked the Court to vacate the overly broad non-destruct protective order which was entered at the commencement of this action without notice to them. These Moving Defendants have previously submitted to the Court their Joint Memorandum supporting their motions. Plaintiffs then filed a Memorandum opposing those motions. This Supplemental Joint Memorandum is submitted to discuss some of the points raised in Plaintiffs' Memorandum. In addition, Moving Defendants now ask that certain evidence submitted by Plaintiffs be excluded pursuant to Minnesota Rule of Evidence 408.

II. Facts

The Plaintiffs submitted to the Court affidavits from their Minnesota and Norwegian attorneys as well as documentary evidence obtained by Plaintiffs during the course of the settlement negotiations which took place prior to

commencement of this lawsuit. It is the position of these Moving Defendants that evidence obtained during the course of settlement negotiations by Plaintiffs is not admissible in this proceeding pursuant to Rule 408 of the Minnesota Rules of Evidence. (See discussion at pp. ——, infra). Nonetheless, Moving Defendants are submitting contemporaneously herewith the Affidavit of Robert D. Anderson, President of Joseph Co., to rebut the evidentiary presentation made by Plaintiffs.

In his Affidavit Mr. Anderson describes in exhaustive detail the negotiations which took place between the Plaintiffs and Shipping between September and December 1981. The purpose of those negotiations was to attempt to compromise and settle the Plaintiffs' contractual claims against Shipping by restructuring Shipping's obligations to Plaintiffs. During the three and one-half months of unsuccessful negotiations, the parties met on five occasions for long periods of time in two cities in Norway, as well as in Copenhagen, London, and Minneapolis. In addition, numerous telephone and telex communications were exchanged between the parties.

The parties reached the verge of agreement on several occasions. The result of such an agreement would have been that Shipping paid Plaintiffs many millions of dollars over a long period of time. Necessarily, to reach the verge Shipping had to make many statements in negotiations which would tend to indicate and disclose its thought processes regarding its liabilities in this dispute. Mr. Anderson plainly states in his Affidavit that none of such statements were made with the intention of admitting liability to the Plaintiffs or with the intention of conceding that Plaintiff had or would suffer any amount of damages. Of

course, Plaintiffs are now trying to claim that the statements made in those protracted negotiations were declarations against interest by Shipping and Joseph Co.

As Mr. Anderson further indicates, during the course of the settlement negotiations the Plaintiffs asked Shipping and Joseph Co. to make available to them extensive data and financial information. All of Plaintiffs' requests were granted, with Shipping and Joseph Co. literally opening up their files to be freely inspected. Plaintiffs now attempt to claim that documents have been altered, but as Mr. Anderson explains, the incident to which Plaintiffs refer involves issuance of a contract to Joseph Co. which was originally in the name of Shipping. Not only was this event disclosed voluntarily to Plaintiffs during settlement negotiations, but no document was ever destroyed or altered; the original agreement was merely suspended.

III. Argument

A. *Federal law requires that the action against Shipping be stayed pending the outcome of arbitrations between each of the Plaintiffs and Shipping.*

In Moving Defendants' Joint Memorandum it was argued that this action must be stayed pending completion of arbitration proceedings between Shipping and the five shipowners who are plaintiffs in this action. After submission of the Joint Memorandum, Shipping commenced three separate actions in the United States District Court for the Southern District of New York to compel the three Plaintiffs which had agreed to arbitrate in New York City to go to arbitration with Shipping. Those shipowners—Partredereit Lista, Scout Shipping Co., Inc. and J. Lauritzen A/S—capitulated to Shipping's demands and appointed arbi-

trators. In view of that capitulation, Shipping cancelled the hearing scheduled before the Honorable Milton Pollack in New York on April 23, 1982 and voluntarily dismissed the three actions without prejudice. Shipping has retained counsel in New York to represent it in the arbitrations and anticipates that it will designate its arbitrator within a few days. Shipping has also retained counsel in London and is in the process of selecting an arbitrator for these arbitrations with Plaintiffs Partrederiet Polycrest and Tailheiyo Kaiun.

In their Memorandum, Plaintiffs argue that the claims made against Shipping in Counts VI, VII, and VIII of their Complaint are not arbitrable. By their actions in the proceeding in the United States District Court for the Southern District of New York, as well as by their silence on the subject in this Court, Plaintiffs presumably agree that the allegations in Count I of their Complaint are arbitrable in their entirety between Plaintiffs and Shipping and should be stayed.[1]

While Shipping does not agree with Plaintiffs that the claims asserted in Counts VI, VII, and VIII of the Plaintiffs' Complaint are not arbitrable, Shipping is willing to waive its right to have those claims arbitrated and have the issues raised in those Counts decided by this Court provided that the entirety of this lawsuit is stayed pending the outcome of the arbitrations.

B. *Federal law requires that the entire action be stayed pending resolution of the arbitration proceedings.*

It is the position of Moving Defendants that this entire lawsuit must be stayed in all respects pending the comple-

[1]Due to their silence on the subject, Plaintiffs apparently agree that Counts II, III, IV, and V should also be stayed.

tion of the arbitration proceedings. The applicable statute is 9 U.S.C. §3, which provides:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referrable to arbitration under an agreement in writing for such arbitration, the court in which the suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referrable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Plaintiffs argue that this statute applies only to actions commenced in federal court and, therefore, does not govern the present case. However, as Moving Defendants point out in their Joint Memorandum, it is well established "that the state courts are entirely able, as well as required, to apply the United States Arbitration Act and compel arbitration pursuant to the Act if the statutory requisites are present." *Commercial Metals Co. v. Balfour Guthrie & Co., Ltd.*, 577 F.2d 264, 269 (5th Cir. 1978). In *Northwest Mechanical, Inc. v. Public Utilities Commission*, 283 N.W.2d 522, 523-524 (Minn. 1979) our Supreme Court recognized that federal law governs actions pending in the courts of this State which involve agreements such as those in the present case. Therefore, the provisions of 9 U.S.C. §3 control here.

Plaintiffs further argue that because Section 3 of the Arbitration Act provides that the Court may "stay the trial of the action" pending completion of arbitration, this

Court may not stay this entire lawsuit as Moving Defendants have requested. Plaintiffs have cited no authority to support their contention, and the well established rule is that Section 3 requires the stay of the entire lawsuit and not just of the trial of the case. In *Dickstein v. duPont*, 320 F.Supp. 150, 154 (D. Mass. 1970), affirmed 443 F.2d 783 (1st Cir. 1971). the Court said:

> "Finally, plaintiff claims the stay should be limited to the trial only. The language of 9 U.S.C. §3 specifically authorizes the court to 'stay the trial'. However, stay orders have been applied to 'actions' and 'proceedings', and it has been held that the overall purpose of the Arbitration Act is not merely to expedite the resolution of disputes, but also to avoid delay and the expenses of litigation.
>
> "Accordingly, the defendant's motion to stay all the proceedings in this action pending the decision of the Arbitration Board is granted."

Because the courts have interpreted Section 3 to require the stay of all proceedings, not merely the trial, it has become a well-established rule that pretrial proceedings such as discovery will not be permitted once a stay has been granted. See, e.g., *Mississippi Power Co. v. Peabody Coal Company*, 69 F.R.D. 558, 565-567 (E.D. Tenn. 1976); *Levin v. Ripple Twist Mills, Inc.*, 416 F. Supp. 876, 880 (E.D. Pa. 1976). Consequently, there is absolutely no merit to Plaintiffs' contention that this Court may only stay the trial of the pending lawsuit. Federal law requires that all proceedings, including pretrial discovery proceedings, be stayed pending completion of arbitration.

The central thrust of Plaintiffs' argument is that Section 3 of the Arbitration Act requires stays of arbitrable issues but does not permit a stay of nonarbitrable issues. Plaintiffs do not cite any cases in support of their proposition but, instead, argue that the cases cited by Moving Defendants in their Joint Memorandum (which hold that judicial proceedings pertaining to nonarbitrable issues may be stayed pending arbitration of arbitrable issues) are not applicable to this situation. However, it is well within the discretion of this Court to stay Counts II through VIII of Plantiffs' Complaint pending completion of arbitration of the claims in Count I. For example, in *Sibley v. Tandy Corporation*, 543 F.2d 540, 544 (5th Cir. 1977), the Court stayed federal securities law claims in a lawsuit pending arbitration of breach of contract claims. The Fifth Circuit reasoned that if the Plaintiff lost the arbitration proceeding, the basis of the securities law claims would no longer exist; therefore, the Court said, "considerations of judicial economy" required that the non-arbitrable claims be stayed. Plaintiffs state that this leading decision is "inapposite to this case" but they do not explain their statement.

Plaintiffs similarly assert that *Fox v. Merrill Lynch & Co., Inc.*, 453 F. Supp. 561, 567 (S.D. N.Y. 1978) is inapposite here, but again they fail to state the basis of their reasoning. The rule in *Fox* is worth repeating again here:

> "In the instant case, it is appropriate to stay judicial proceedings on the antitrust claims pending arbitration of the balance of the controversy. Fox's contractual claims under the terms of the pension plan turn on the construction of the plan provisions and questions of waiver and estoppel, which are substantially distinct

> from the issues raised by his antitrust challenge for the forfeiture provision. Further, *Fox's antitrust claims will be moot if he prevails on his contention that the forfeiture provision may not be applied to deny him his pension benefits on account of contract law considerations.* * * *" (Emphasis added.)

There are many other cases decided by the federal courts in which stays of entire lawsuits were granted notwithstanding the fact that there were arbitrable as well as nonarbitrable issues involved in the case. For example, in *Collins Radio Company v. Ex-Cell-O Corporation,* 467 F.2d 995, 1000 (8th Cir. 1972), the Eighth Circuit upheld the trial court's stay of all proceedings upon a three count complaint, even though two of the three counts involved nonarbitrable issues and arose upon contracts which were independent of the contract involved in the third count, which did contain an arbitration clause. In *Harmon Electrical Construction Co. v. Consolidated Engineering Co.,* 347 F.Supp. 392, 397-398 (D. Del. 1972) the Court stayed an entire lawsuit where some claims arising out of a series of transactions were arbitrable and some were nonarbitrable. In *Janmort Leas, Inc. v. Econo-Car International,* 475 F.Supp. 1282, 1293 (E.D. N.Y. 1979) the court stayed an entire lawsuit which included arbitrable and nonarbitrable claims, saying:

> "Finally, the Court is of opinion that the demands of judicial economy and efficient utilization of the resources of court, counsel and parties will best be served by deferring further proceedings in this action until arbitration can be completed. While arbitration will not necessarily dispose of the many inarbitrable claims, it

> will certainly clarify and perhaps even simplify the remaining issue. Indeed, because plaintiff's antitrust claims, as pleaded, turn largely on allegations that defendants have engaged in a pattern of conduct inconsistent with ECI's contractual obligations to Janmort, and therefore mirror the allegations upon which the claims set forth in Counts II through IX are predicated, we think the course of proceedings can only benefit from prior arbitration of the issues — including questions of contract interpretation and effect, as well as performance * * *"

See, also, *Societe Nationale v. General Tire & Rubber Co.*, 430 F.Supp. 1332, 1334 (S.D. N.Y. 1977).

The basic principle upon which all these decisions are predicated was authoritatively set forth by Justice Cardozo in *Landis v. North American Co.*, 299 U.S. 248, 57 S.Ct. 163, 166 (1935):

> "* * * the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. * * *

This Court clearly has the authority and power to stay this entire lawsuit, arbitrable and nonarbitrable claims alike.

As a fallback position, the Plaintiffs contend that even if it is possible for this Court to stay the entire action, it may only do so if Moving Defendants are able to demonstrate that the arbitration may be expected to conclude within a

reasonable time and that delay would not work an undue hardship upon Plaintiffs. It is true that some courts have considered such factors in deciding whether or not to exercise their discretion to stay the entirety of a lawsuit which contains arbitrable as well as nonarbitrable issues. See, e.g., *Nederlandse Erts-Tankersmaatschappiz v. Isbrandtsen Co.*, 339 F.2d 440 (2nd Cir. 1964). On the other hand, in many of the cases in which entire lawsuits containing arbitrable and nonarbitrable claims have been stayed such a showing was not required. See, e.g., *Collins Radio Company v. Ex-Cell-O Corporation, supra; Harmon Electrical Construction Co. v. Consolidated Engineering Co., supra.*

Plaintiffs assert that "there are powerful reasons not to stay the non-arbitrable claims." In support of that contention, Plaintiffs have offered the Affidavit of Erik Hellstenius, an attorney from Oslo, Norway, who represents two of the Plaintiffs. Moving Defendants have objected to introduction of Mr. Hellstenius' Affidavit and have moved to have it stricken.

Mr. Hellstenius states in his Affidavit that he has advised some of the Plaintiffs since September 1981 concerning their negotiations with Shipping to seek an amicable resolution of the differences between the parties. Thirteen of the eighteen paragraphs in Mr. Hellstenius' Affidavit describe in extensive detail the settlement negotiations which took place between the parties between September and December of 1981. Based upon the information Mr. Hellstenius learned during those settlement negotiations, Mr. Hellstenius asserts that Shipping has admitted its liability to the Plaintiffs and is estopped from denying such liability. Exhibits labeled A through D are attached to Mr. Hellstenius' Affidavit. All of these exhibits were obtained from either Shipping or Joseph Co. during the course of the same settlement negotiations.

On the strength of the information learned by Mr. Hellstenius during the settlement negotiations, Plaintiffs argue that "Joseph Co. and Shipping . . . acknowledge that Shipping was liable to Plaintiffs for damages and the damages due Plaintiffs exceeded, in the aggregate, $10,500,000." They further argue, based upon what Mr. Hellstenius learned during the settlement negotiations, that Shipping will be unable to pay an arbitration award of that magnitude. On the basis of these conclusions, Plaintiffs argue that it would be a denial of justice for this Court to stay Counts VI, VII and VIII of their Complaint.

The attempt by the Plaintiffs to assert that Shipping is liable to them in an aggregate amount of $10.5 million based upon statements made in settlement negotiations conducted just prior to commencement of this lawsuit flies rudely in the face of Rule 408 of the Minnesota Rules of Evidence, which prohibits introduction of such evidence into judicial proceedings. Rule 408 provides:

> "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as either validity or amount, *is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.* This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of

> a witness, negating a contention of undue delay, or proving an effort to conduct a criminal investigation or prosecution." [Emphasis added.]

When Rule 408 was adopted in 1977, it substantially altered Minnesota law. The Committee Comment on the rule stated that "the increased protection is justified to the extent that it will encourage frank and free discussion in compromise negotiations and avoid the necessity for parties to speak in terms of hypotheticals. Not only are offers of compromise or the acceptance of compromise inadmissible, but also all statements made in compromise negotiations." The submission to this Court by Plaintiffs of the Affidavit of Mr. Hellstenius and the documents appended thereto is, therefore, at best "of dubious propriety and significance." See, *Playboy Enterprises, Inc. v. Chuckleberry Pub.*, 486 F.Supp. 414, 423 (S.D.N.Y. 1980).

Plaintiffs have introduced evidence of the settlement negotiations between the parties to attempt to establish in this Court's mind the liability of Shipping, in order to make this Court reluctant to grant the stay which should be granted. Rule 408 precludes this Court from considering such evidence. Public policy encourages free and frank discussion during settlement negotiations. In the present case, large sums of money were involved and negotiations extended over a period of several months on two continents. Shipping and Joseph Co. spoke freely, and in retrospect perhaps too loosely, in an attempt to resolve the dispute with Plaintiffs before it erupted into an all-out legal war. Plaintiffs now seek to turn those settlement discussions to their advantage by characterizing them as admissions both of liability and damages to Plaintiffs. The intent behind Rule 408 is that

just such an event not occur. For that reason, the Hellstenius Affidavit should not be admitted into evidence and should be stricken from the record.

Plaintiffs further complain that it may take as many as four years to complete the London arbitrations. This situation is undoubtedly not helped by the fact that to date Partrederiet Polycrest and Taiheiyo Kaiun, the Plaintiffs who must arbitrate with Shipping in London, have failed to appoint any arbitrators, even though negotiations between the parties broke down in December. Mr. Hellstenius, in his Affidavit, predicts that it will take four years to arbitrate in London. His prediction is based upon his experience the past seventeen years during which he has been involved in at least 500 arbitration proceedings in London. However, if Mr. Hellstenius' experience over the past seventeen years truly has been that it takes about four years to complete a London arbitration, that fact must undoubtedly have been known to his clients when they entered into charter party agreements which provided for arbitration in London. Those parties should not now be heard to complain that a voluntary procedure which they contractually agreed to is too time consuming. Furthermore, if Mr. Hellstenius was aware of the length of time it allegedly takes to arbitrate in London at the time his clients agreed to begin this litigation jointly, it must be presumed that they recognized the possibility that two of the Plantiffs would have to arbitrate their controversies with Shipping in London, thus causing a delay for the other three parties in obtaining a quick resolution of this litigation following the New York arbitrations. The two Plaintiffs who must arbitrate in London cannot escape from the burdens of arbitrating in London by pointing to their voluntary joinder with the other three plaintiffs in com-

mencing this action. Similarly, the three plaintiffs who must arbitrate in New York cannot now complain that by having joined together with the others as Plaintiffs they have become bound to await the outcome of the London arbitration which they knew or should have known may take up to four years.

For its part, Shipping pledges to this Court that it will do everything within its power, and instruct its New York counsel and its London counsel to do everything within their power, to bring the arbitrations to hearing as quickly as humanly possible. Perhaps if the Plaintiffs would commit to do likewise, the arbitrations can be completed in a much shorter time frame than Mr. Hellstenius predicts.

C. *The Non-Destruct Protective Order Should be Vacated.*

Plaintiffs argue that a non-destruct protective order is called for because Shipping and Joseph Co. have already "altered" documentary evidence. They cite as proof of this serious contention the reissuance of a contract for the shipment of Brazilian citrus pellets, originally in Shipping's name, in the name of Joseph Co. The Anderson Affidavit makes it clear that Plaintiffs' contention is wholly devoid of merit.

The contract *was* originally issued to Shipping. When Plaintiffs let it be known in the maritime community that Shipping was in financial distress, the other party to the contract threatened cancellation. To avoid this event, it was agreed that a substitute contract be issued to the solvent Joseph Co. Proceeds were still to find their way to Shipping for the benefit of its creditors. Shipping voluntarily advised Plaintiffs of this transaction when it occurred during the course of settlement negotiations, and Plaintiffs agreed to it. A new contract was issued in Joseph Co.'s name. The

original contract was neither altered or destroyed. Plaintiffs' accusation to the contrary is an insult which is without basis in fact.

Plaintiffs have shown no need for a non-destruct protective order beyond the desire, which exists in every lawsuit, that documents be available for discovery purposes. If this were sufficient ground for issuance of a non-destruct order, one would automatically issue in every case and the principle would undoubtedly be incorporated into a civil procedure rule. This clearly is not an extraordinary case which requires such extraordinary protection, especially given Shipping's and Joseph Co.'s past cooperation in making documents available for Plaintiffs' inspection.

IV. Conclusion

It is necessary and appropriate for this Court to stay this lawsuit pending arbitration between Plaintiffs and Shipping. An order staying this action should be issued forthwith, which also vacates the non-destruct protective order and which strikes the Hellstenius Affidavit from the record.

Respectfully submitted,

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